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In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

FELIX HUMBERTO BRIGNONI-PONCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1a–6a) is not yet reported.

JURISDICTION

The *en banc* judgment of the court of appeals (App. B, *infra,* p. 7a) was entered on June 14, 1974. On July 10, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including August 13, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the warrantless stop of an automobile by Border Patrol officers, acting pursuant to their statutory authority to question persons in the vehicle whom they believe to be aliens concerning their right to be or remain in the United States, violates the Fourth Amendment's proscription against unreasonable searches and seizures and requires the suppression of evidence obtained as a result of the stop but without any subsequent search.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Section 287(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> * * * * *
>
> (3) within a reasonable distance from any external boundary of the United

> States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; * * *.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, respondent was convicted on two counts of transporting aliens who were present in this country illegally, in violation of 8 U.S.C. 1324(a)(2). He was sentenced to four years' imprisonment on count 1, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2), and five years' probation on count 2.

1. The evidence at trial established that on March 11, 1973, Border Patrol Agents Brady and Harkins were on duty in a patrol car observing northbound traffic on Interstate Highway 5 approximately four miles south of San Clemente, California (Tr. 15–16).[1]

[1] The officers were parked off the highway at the site of a permanent immigration checkpoint which was closed because of inclement weather (Tr. 16–18). The patrol car was parked at a 90-degree angle to the highway with its headlights on (Tr. 22). The officers were able to see the occupants of passing vehicles (*ibid.*). A description of the San Clemente checkpoint and its normal mode of operation is set forth in *United States* v. *Baca*, 368 F. Supp. 398, 410–411 (S.D. Cal.). The checkpoint is located approximately 62 air miles and 66 road miles north of the Mexican border (*id.* at 410).

During the early evening hours, they observed traveling north a vehicle driven by respondent and containing two passengers (Tr. 18–19, 20–22). The officers pursued and stopped the car for a "routine immigration inspection" (Tr. 19, 21–22) because they observed that its three occupants appeared to be of Mexican descent (Tr. 22–23).

Upon questioning the passengers in the vehicle in English and Spanish concerning their citizenship, the officers discovered that they spoke no English and had no papers authorizing them to be in the United States (Tr. 19–20). Respondent and the passengers were then arrested (Tr. 21). At trial, both passengers testified that they are Mexican citizens who had entered the United States illegally (Tr. 24–25, 57, 63–64).

The parties agreed by stipulation that respondent's motion to suppress the evidence derived from the stop of his vehicle could be heard and decided at the time of trial (Clerk's record on appeal, p. 35). The district court denied the motion (*ibid.*).

2. Subsequent to respondent's trial, this Court decided *Almeida-Sanchez* v. *United States*, 413 U.S. 266, which held that a warrantless roving patrol *search* of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause or reasonable suspicion to believe that the vehicle contained any aliens present in this country unlawfully, violated the Fourth Amendment's proscription against unreasonable searches and seizures. The Ninth Circuit subsequently held that the ruling in *Almeida-Sanchez* should be applied retroactively to require the

exclusion of evidence seized in similar roving patrol searches conducted prior to the date of this Court's decision. *United States* v. *Peltier,* C.A. 9, No. 73–2509, decided May 9, 1974, pending on the government's petition for a writ of certiorari, No. 73–2000. It also held, however, that *Almeida-Sanchez* should apply only prospectively with respect to searches conducted at fixed immigration checkpoints. *United States* v. *Bowen,* C.A. 9, No. 72–1012, decided May 9, 19774, pending on the defendant's petition for a writ of certiorari, No. 73–6848.[2]

In the present case, the court of appeals, sitting *en banc,* reversed respondent's conviction (App. A, *infra,* pp. 1a–6a). It held first that the Border Patrol officers' conduct in pursuing respondent's vehicle and flagging it to the side of the road was "more characteristic of a roving-patrol stop than of a fixed-checkpoint stop" (*id.* at 3a). Therefore, under the court of appeals' decision in *Peltier,* the principles of *Almeida-Sanchez* apply even though the stop occurred prior to the date of this Court's decision in that case (*id.* at 2a–3a).

[2] The Ninth Circuit had first held in *Bowen* that *Almeida-Sanchez* should be extended to invalidate warrantless, non-probable-cause searches of automobiles for aliens at fixed checkpoints. That ruling was later applied in a case involving a post-*Almeida-Sanchez* checkpoint search (*United States* v. *Ortiz,* C.A. 9, No. 74–1249, decided June 19, 1974). We have filed a petition for a writ of certiorari in *Ortiz* (No. 73–2050), in which we argue that warrants are not required for checkpoint searches of vehicles for concealed aliens and that, even if warrants are required, the ruling should not apply to checkpoint searches that occurred prior to the court of appeals' decision in *Bowen.*

The court next held that warrantless *stops* of vehicles, "without probable cause, and without even a reasonable suspicion that any of the occupants are illegal aliens [,] * * * are entirely inconsistent with the Supreme Court's opinion in *Almeida-Sanchez*" (*id.* at 3a–4a). The court of appeals acknowledged that *Almeida-Sanchez* involved a search rather than only a stop and that 8 U.S.C. 1357(a) gives Border Patrol officers authority not only to search vehicles for concealed aliens without a warrant but also "to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States * * *." The court held, however, that this Court's opinion in *Almeida-Sanchez* "reflects at least as much concern with the initial stop as with the subsequent search" (App. A, *infra*, p. 4a).

The court concluded that a warrantless stop of a vehicle is permissible only if the officers have information that constitutes "a founded suspicion" that one or more occupants of the vehicle are aliens whose presence in this country is unlawful (*id.* at 6a). Although not disputing that the officers here had reason to believe that respondent and his passengers were aliens, the court held that they did not have a founded suspicion that the vehicle's occupants were present in this country *unlawfully*. It therefore concluded that "the stop and interrogation * * * were illegal, and the fruits of the illegal conduct were inadmissible" (*ibid.*).

The court refused to "adopt the approach taken by our brothers on the Tenth Circuit" (*id.* at 3a) in *United States* v. *Bowman*, 487 F. 2d 1229, in which that court held that the stopping of an automobile "for

the limited purpose of determining [the driver's] citizenship was entirely justified" under 8 U.S.C. 1357(a)(1) and is not barred by the Fourth Amendment or by the principles of *Almeida-Sanchez* (487 F. 2d at 1231).

REASONS FOR GRANTING THE WRIT

This case presents an important issue concerning the Border Patrol's authority, consistent with the Fourth Amendment, to employ a law enforcement method that has a significant role in the Border Patrol's program of deterring and detecting the unlawful entry and transportation of aliens in this country. That issue—which this Court did not decide in *Almeida-Sanchez* and on which the courts of appeals have reached inconsistent results—is whether the Border Patrol may, without a warrant, briefly stop a vehicle to question its occupants about their right to be in this country, when the officers know or reasonably believe that the occupants may be aliens.[3]

[3] In our petition for a writ of certiorari in *United States* v. *Peltier*, No. 73-2000, we argue that *Almeida-Sanchez* should not be applied retroactively to exclude evidence discovered as a result of a warrantless roving patrol stop and search conducted prior to this Court's decision. If the Court grants our petition and agrees with our contention in *Peltier*, that decision might provide a ground upon which the judgment in the present case could be reversed, since the stop of respondent's automobile occurred prior to the decision in *Almeida-Sanchez*. If the exclusionary rule is inapplicable in the case of a pre-*Almeida-Sanchez* stop and search, it is presumably inapplicable in the case of a pre-*Almeida-Sanchez* stop for interrogation without a search.

Because of the importance of prompt resolution of the question presented here to the administration of the Border Patrol's responsibilities, and in view of the existing conflict between the cir-

1. The decision in this case conflicts with that of the Court of Appeals for the Tenth Circuit in *United States* v. *Bowman, supra*. The court of appeals in the present case held that a warrantless immigration stop of a vehicle may be made only when the officers have a "founded suspicion" that the occupants of the vehicle are aliens whose presence in this country is unlawful. The Tenth Circuit, by contrast, held in *Bowman* that a stop of a vehicle "for the limited purpose of determining [the occupants'] citizenship" (487 F. 2d at 1231) is permissible without regard to whether the officers reasonably suspect that the occupants are present in this country unlawfully.

In *Bowman*, Border Patrol officers stopped the defendant in his car at a fixed checkpoint near Truth-or-Consequences, New Mexico, and, while questioning him about his citizenship, one of the officers detected the odor of marihuana. The officers then searched the car and discovered the marihuana in a footlocker and suitcase in the car's trunk. Ruling that the odor of marihuana gave the officers probable cause to search the car after it had been stopped, the court of appeals turned to the question of "the validity of the initial stopping" of the vehicle (*ibid.*). The court observed that 8 U.S.C. 1357(a)(1) authorizes Border Patrol officers "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States * * *." It held that *Almeida-Sanchez* limits only the Border Patrol's

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cuits on that question, we do not present in this petition the retroactivity question presented in *Peltier* and we do not here urge the nonretroactivity of *Almeida-Sanchez* as a ground for reversal.

authority to *search* a vehicle for concealed aliens under 8 U.S.C. 1357(a)(3) and does not affect its authority to *stop* a car under Section 1357(a)(1) "to make routine inquiries as to an individual's nationality" (*ibid.*).[4]

The stop in *Bowman* occurred at a fixed immigration checkpoint that was in operation, whereas the stop in the present case was effected by officers patrolling in the area of a fixed checkpoint that was not in operation. The court's reasoning in *Bowman,* however, was not limited to checkpoint stops, and the court's reasoning in this case was not limited to roving patrol stops. Indeed, the Ninth Circuit subsequently held, on the authority of its decision in this case, that checkpoint stops, like roving patrol stops, require "a reasonable belief, founded upon 'articulable' facts, that one or more of the people to be interrogated are aliens illegally in the country" (*United States* v. *Esquer-Rivera,* C.A. 9, Nos. 74—1110 and 74–1099, decided July 1, 1974, slip. op. 2).

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[4] Subsequently, in *United States* v. *Newman*, 490 F. 2d 993, the Tenth Circuit reversed a defendant's conviction because the marijuana discovered in his trunk was the product of an illegal search made without probable cause after he had been stopped at a turnpike gate near Miami, Oklahoma. The court pointed out, however (*id.* at 995):

"We do not question the right of a Border Patrol Agent to briefly detain an individual for the purpose of ascertaining his nationality. To this extent [the agent's] initial stopping of the appellants' vehicle in the case at bar was, in and of itself not illegal. * * *"

The upshot is that warrantless stops for interrogation are constitutionally permissible in the Tenth Circuit but constitutionally forbidden in the Ninth Circuit.[5]

2. The conflict should be resolved by this Court. The fair and effective enforcement of our Nation's immigration laws requires a definitive determination of the Border Patrol's authority to conduct routine interrogation stops of vehicles, particularly in the border areas, to determine the nationality and status of persons believed to be aliens. There are numerous cases pending in the lower federal courts that may turn on whether evidence derived from such stops may properly be introduced at trial. That determination should not, we submit, depend on the fortuity of the particular jurisdiction in which the stop occurred.

Moreover, it is important for the Border Patrol and the courts to know whether warrants are required for interrogation stops, and, if so, what standards should be applied by the courts in considering applications for such warrants. In the Ninth Circuit, for example, where the court of appeals has held that warrantless checkpoint searches and warrantless stops for interrogation violate the Fourth Amendment, the magistrates have refused to issue warrants for searches of automobiles at checkpoints and, in some cases, even for interrogation stops at some checkpoints. Since the

[5] The Fifth Circuit has not decided the issue. One panel, however, expressed "serious doubt" as to the validity of warrantless stops for interrogation in light of *Almeida-Sanchez*. *United States* v. *Rodriguez-Hernandez*, 493 F. 2d 168, 169, pending on petition for a writ of certiorari, No. 73-6851.

success of the Border Patrol's enforcement effort depends upon a coordinated program of stops and limited searches of vehicles at permanent and temporary checkpoints away from the border and by roving patrols, the inability to operate a particular checkpoint may substantially weaken the entire network by permitting illegal alien traffic to bypass other checking operations and to flow freely through the unpatrolled area. The existing uncertainty concerning the need for stop warrants and the showing necessary to secure them seriously threatens to undermine the Border Patrol's effectiveness.

3. On the merits, we submit that the decision in this case represents an incorrect application of the principles of *Almeida-Sanchez*. There is, in our view, a critical distinction of constitutional dimension between a search of an automobile for concealed aliens and a brief stop of an automobile to question its occupants about their right to be in this country. Even a limited search for aliens—involving an inspection of the car's passenger compartment, its trunk, and perhaps under the hood or behind the rear seat—is far more intrusive than a stop to ask a few questions.

Mr. Justice Powell's concurring opinion in *Almeida-Sanchez* recognized that the reasonableness of a search of an automobile for aliens does not necessarily depend upon the existence of probable cause to believe that a concealed illegal alien will be found in the automobile. Rather, as in *Camara* v. *Municipal Court,* 387 U.S. 523, a particular search may be reasonable if conducted as part of an area-wide program of searches that is itself reasonable, measured by the existence of a legitimate law enforcement need on the one hand and

the extent of the official intrusion on the other. Mr. Justice Powell thus concluded that "under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas" (413 U.S. at 279).

In the context of a brief stop to make a limited inquiry about a person's nationality, there need not exist even an "equivalent of probable cause" (*ibid.*). We acknowledge that such a stop in the circumstances of this case is a sufficient interference with an individual's "personal security" to constitute a "seizure" under the Fourth Amendment (*Terry* v. *Ohio,* 392 U.S 1, 19 and n. 16). As this Court has held. however, "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest" (*id.* at 22).

Just as there can be a "constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas" (413 U.S. at 279), there can be circumstances that justify *stopping* an automobile to make a limited inquiry of its occupants even though the officers have no reason to believe that the occupants of the particular vehicle are aliens whose presence in this country is unlawful. Such circumstances exist in the area of the Mexican border, where there is a high incidence of illegal transportation of aliens who have entered this country unlawfully. Border Patrol officers may, we submit, make an

interrogation stop of a vehicle when they reasonably believe that its occupants are aliens, even if they have no reason to believe that the occupants are illegal aliens.

Although, on Mr. Justice Powell's reasoning in *Almeida-Sanchez,* a prior judicial determination is required to assure the reasonableness of the Border Patrol's plans for particular roving patrol search operations, no such prior judicial determination is required to assure the reasonableness of a limited interrogation stop such as the one conducted in the present case. The "intrusion upon constitutionally protected rights" (*Terry* v. *Ohio, supra,* 392 U.S. at 19, n. 16) is, by comparison to a search of an automobile, so reduced that there is little need for prior judicial supervision of the stopping procedure. In contrast to the situation as viewed by the majority in *Almeida-Sanchez,* there is here no claim of an "extravagant license to search" (413 U.S. at 268).

That is not to say that an aggrieved person may not allege and prove in a particular factual setting that the stop of his automobile was unreasonable or that the manner and scope of the officers' subsequent questioning were unlawful. We do say, however, that the Fourth Amendment values at stake are adequately protected when these claims are adjudicated *after* the stop and questioning have occurred and in the context of an adversary proceeding on specific facts.

We emphasize that a warrantless roving patrol stop for purposes of interrogation must be conducted in accordance with the Border Patrol's statutory authority. That is to say, the officers may stop a car only "to interrogate any alien or person believed to be an alien

as to his right to be or to remain in the United States" (8 U.S.C. 1357(a)(1)). Thus, while an officer need not, for the reasons we have discussed, have probable cause to believe that the automobile's occupants are aliens illegally present in this country—*i.e.*, that a crime is being committed—he must reasonably believe that they are aliens.

That requirement is satisfied, we submit, where, as here, officers patrolling in an area known to have a high incidence of illegal alien traffic, near a fixed checkpoint that has been closed because of inclement weather,[6] observe a northbound automobile containing three persons who appear to be of Mexican descent. In these circumstances, a brief stop of the car to inquire whether the occupants have a right to be in this country does not violate the Fourth Amendment and does not exceed the scope of the officers' authority under the statute.[7]

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[6] More than 12,000 deportable aliens were apprehended at the San Clemente checkpoint in fiscal year 1973 (*United States v. Baca*, *supra*, 368 F. Supp. at 410). "[I]t is an unusual 8 hour shift that does not result in at least 20 or 30 apprehensions" (*ibid.*).

[7] Moreover, Section 1357(a)(3)—which authorizes officers within a reasonable distance of the border to search vehicles for aliens—may comprehend independent authority to stop a vehicle without searching it, not principally to investigate the nationality of the visible occupants, but to ask questions designed to ascertain whether the vehicle contains any *concealed* aliens. On that reasoning, it may be that a vehicle could be stopped even without a belief that its visible occupants are aliens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1974.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 73-2161

UNITED STATES OF AMERICA, APPELLEE

v.

FELIX HUMBERTO BRIGNONI-PONCE, APPELLANT

OPINION

[Decided June 14, 1974]

Appeal from the United States District Court for the Southern District of California

Before CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, and SNEED, *Circuit Judges.*

GOODWIN, *Circuit Judge:* Felix Humberto Brignoni-Ponce appeals his conviction for transporting aliens in violation of 8 U.S.C. § 1324(a)(2). Two illegal aliens were discovered following a warrantless stop of his car near the San Clemente immigration checkpoint. The government contends that even if recent decisions by the Supreme Court and this court have stripped the Border Patrol of its authority to stop vehicles and search them for aliens, the Border Patrol still retains the authority, exercised in this case, to stop and interrogate any person believed to be an alien as to his right to remain in the United States. We reject that contention and reverse the conviction.

On March 11, 1973, the San Clemente immigration checkpoint, located in San Onofre, California, approximately 65 miles north of the Mexican border on Interstate 5 between San Diego and Los Angeles, was

closed because of inclement weather. During the early morning hours, an agent of the Border Patrol was observing northbound traffic from his patrol car, parked at a ninety-degree angle to the interstate highway. Observing a passing vehicle whose occupants appeared to be of Mexican descent, the agent pursued the car and stopped it. Investigation soon revealed that the two passengers were illegally in the United States. They and the driver, Brignoni-Ponce, were then arrested.

In *United States v. Peltier,* F. 2d (9th Cir., May 9, 1974) (en banc), this court held that the rule announced by the Supreme Court in *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), applied retroactively to all cases involving roving-patrol searches which were pending on appeal at the time that *Almeida-Sanchez* was announced. However, in *United States v. Bowen,* F. 2d (9th Cir., May 9, 1974) (en banc), we also held that, although searches by border-patrol agents at fixed checkpoints violated the Fourth Amendment, *Almeida-Sanchez* would not be applied retroactively to fixed-checkpoint searches conducted prior to the date of decision of *Almeida-Sanchez.*

The stop of Brignoni-Ponce's car was made before the decision in *Almeida-Sanchez* was announced. The first question, then, is whether or not the stop was more like one by a roving patrol than one at a fixed checkpoint. Although we held in *United States v. Morgan,* F. 2d (9th Cir., June 14, 1974) en banc), that searches at the San Clemente checkpoint were fixed-checkpoint searches rather than roving-patrol searches. Brignoni-Ponce's car was not stopped at the checkpoint. Rather, because the checkpoint was closed and no marked barricades designed to impede vehicular traffic were in place, Brignoni-Ponce would

have proceeded undisturbed except for the decision to pursue him. His car was overtaken and stopped north of the closed checkpoint. Although the line between a roving-patrol stop and a fixed-checkpoint stop is not a clear one, we hold that pursuing a passing car and flagging it to the side of the road is conduct more characteristic of a roving-patrol stop than of a fixed-checkpoint stop. *See United States v. Grijalva-Carrera,* F. 2d (9th Cir., June 14, 1974) (en banc); *United States v. Bowen,* F. 2d at (slip opinion at 4–5).

The government contends, however, that even if this court holds that the stop was a roving-patrol stop, that holding would not dispose of this case. It argues that *Almeida-Sanchez, Peltier, Bowen, Morgan,* and *Grijalva-Carrera* all involved the constitutionality of searches without probable cause, pursuant to 8 U.S.C. § 1357(a)(3). This case, by contrast, involves merely a stop, pursuant to 8 U.S.C. § 1357(a)(1), for the purpose of interrogating a person believed to be an alien regarding his right to remain in the United States. In support of its argument, the government cites the recent decision by the Court of Appeals for the Tenth Circuit in *United States v. Bowman,* 487 F. 2d 1229 (10th Cir. 1973), holding that *Almeida-Sanchez* applied only to searches under § 1357(a)(3) and not to stops for interrogation under § 1357(a)(1).

We cannot adopt the approach taken by our brothers on the Tenth Circuit. Section 1357(a)(1), unlike § 1357(a)(3), has no requirement that the stop be within a "reasonable distance" from the border. Under the Tenth Circuit's view, immigration officials could stop a vehicle anywhere in the country in order to interrogate its occupants as to their right to be in the United States, without a warrant, without probable

cause, and without even a reasonable suspicion that any of the occupants are illegal aliens.

Such stops are entirely inconsistent with the Supreme Court's opinion in *Almeida-Sanchez*. Although the facts of *Almeida-Sanchez* called into question only that portion of § 1357(a) involving the Border Patrol's authority to stop and search vehicles, the Court's opinion reflects at least as much concern with the initial stop as with the subsequent search. *See, e.g.*, 413 U.S. at 268:

> "* * * It is undenied that the Border Patrol had no search warrant, and that there was no probable cause of any kind for the *stop* or the subsequent search * * *." (Emphasis added.)

And 413 U.S. at 272:

> "* * * [N]either this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the *stop* and search in the present case * * *." (Emphasis added.)

The Court ended its opinion, 413 U.S. at 274–75, by quoting from *Carroll v. United States*, 267 U.S. 132 (1925), as follows:

> "* * * It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official

> authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise * * *." 267 U.S. at 153–54.

Had the Court intended to leave intact the government's asserted right to stop cars on mere suspicion anywhere in the country in order to interrogate their occupants as to their right to remain in the United States, we doubt that it would have quoted this language fom *Carroll.* Even more than immigration searches which had to be conducted within an area no more than 100 miles from the border, these immigration stops offend the "right to free passage without interruption" of "those lawfully within the country."

Moreover, the Tenth Circuit's position is inconsistent with settled law of this circuit. In *United States v. Mallides,* 473 F. 2d 859, 861 (9th Cir. 1973), we held that the stop of a vehicle by police officers, even for the limited purpose of questioning its occupants, must be based upon a "founded suspicion." *See also United States v. Ward,* 488 F. 2d 162, 168–69 (9th Cir. 1973) (en banc). This holding was subsequently applied to investigatory stops by border-patrol agents. *See, e.g., United States v. Mora-Chavez,* — F. 2d — (9th Cir., Apr. 26, 1974); *United States v. Bugarin-Casas,* 484 F. 2d 853, 854 (9th Cir. 1973), *cert. denied,* — U.S. — (1974).

Likewise, the Court of Appeals for the District of Columbia Circuit has held that immigration officials, in accordance with § 1357(a)(1), may make forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country. *Au Yi Lau et al. v. United States Immigration & Naturalization Service,* 445 F. 2d 217,

223 (D.C. Cir.) (later vacated as to one party only), *cert. denied,* 404 U.S. 864 (1971).

Here, the border-patrol agents who stopped Brignoni-Ponce's car did not possess facts which constituted a founded suspicion that he or his passengers were illegal aliens. All that they knew was that Brignoni-Ponce and his companions appeared to be of Mexican descent and were in a sedan traveling north on Interstate 5, approximately 65 miles north of the Mexican border. This is not enough. As we said in *United States v. Mallides:*

> "* * * [T]here is nothing suspicious about six persons riding in a sedan. The conduct does not become suspicious simply because the skins of the occupants are nonwhite * * *." 473 F. 2d at 861.

We hold, then, that the stop and interrogation of Brignoni-Ponce and the passengers in his car were illegal, and the fruits of the illegal conduct were inadmissible. *See United States v. Guana-Sanchez,* 484 F. 2d 590 (7th Cir. 1973), *petition for cert. filed* November 23, 1973 (U.S. No. 73–820).

Reversed and remanded.

APPENDIX B

United States Court of Appeals For the Ninth Circuit

No. 73-2161, DC No. 14805

UNITED STATES OF AMERICA, APPELLEE

v.

FELIX HUMBERTO BRIGNONI-PONCE, APPELLANT

JUDGMENT

Appeal from the United States District Court for the Southern District of California.

This Cause came on to be heard on the Transcipt of the Record from the United States District Court for the Southern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is

Reversed and Remanded.

A true copy
Attest June 20, 1974.

EMIL E. MELFI, JR.,
Chief Deputy and Acting Clerk.
RAY HEWITT,
Senior Deputy.

Filed and entered June 14, 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974